No. 21764

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFFE ELECTRIC COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition the National Labor Relations Board, pursuant Section 10(e) of the National Labor Relations ct, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. ec. 151, *et seq.*),[1] for enforcement of its order R. 12–18, 33–34) issued on April 27, 1966 against spondent.[2] The Board's Decision and Order are

[1] The pertinent statutory provisions are reprinted in the pendix, *infra*, pp. 13–16.

[2] References designated "R." are to Volume I of the record reproduced pursuant to Rule 10 of this Court. References signated "Tr." are to the reporter's transcript of the testi-ony as reproduced in Volume II of the record. References signated "G.C. Exh." or "R. Exh." are to exhibits of the neral Counsel and respondent, respectively. Whenever in a

reported at 158 NLRB No. 42. This Court has juris diction of the proceedings, the unfair labor practic having occurred in San Francisco, California withi this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent, O'Keeffe Elec tric Company, violated Section 8(a) (3) and (1) o the Act by terminating Wilfred Davies, Richar Dewey, Jerson Hernandez, Gary Walters, Garr Cliff, Adalberto Rosales and Yves Beurnez on Feb ruary 24, 1965, because they had joined I.B.E.W Local 6 (hereinafter referred to as "Union" o "Local 6"). The facts underlying the Board's con clusions follow.

A. Respondent's business, employee complement, and relations with Local

Respondent sells, installs, and services certai types of electrical equipment, including small appl ances, fans, ventilating systems, air-conditioning sy tems, and refrigerators (Tr. 13). The business owned by William O'Keeffe, Sr.; it is managed b William O'Keeffe, Jr.; and it employs an office man ger and bookkeeper, Dan Martin (R. 13; Tr. 10, 14 The Company is a member of the San Francis Electrical Contractors Association, Inc., an associ tion which represents employers engaged in electric engineering in and around San Francisco, Californ

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series of references a semicolon appears, those references p ceding a semicolon are the Board's findings; those followi are to the supporting evidence.

n collective bargaining and which has negotiated greements on their behalf with labor organizations— ncluding Local 6. Fischback and Moore is a member f the Association; and its annual gross volume for ervices performed in California exceeds $1,000,000. hat corporation annually purchases goods valued in xcess of $50,000 which are shipped to it from outside he state of California (R. 12–13, Tr. 8–9).

Respondent's employees are divided into two categories, both of which were at one time covered by eparate agreements negotiated by the Association ith Local 6. One group of employees are called iremen and the other group are maintenance men. t the date of the hearing, the wiremen were still overed by a collective bargaining agreement with ocal 6. The maintenance men, with whom this proeeding is exclusively concerned, were covered by ocal 6's "Motor Shop Agreement" prior to Aust 13, 1964 (R. 13; Tr. 138, 176–180, 190–192, . Exh. 1, G.C. Exh. 37).

. Respondent has a disagreement with Local 6, enters into a contract with Sheet Metal Workers Union Local 355 and has its employees join that Union

Sometime in May or June, 1964, respondent hired Richard Dewey as a maintenance man (G.C. Exh. 1). When Dewey was hired, he was sent to Local 6's ffices to be cleared, but that clearance was denied Tr. 41, 117).[3] Shortly thereafter, Bill O'Keeffe Jr.

[3] The record indicates that Local 6 attempted to get respondnt to hire another employee in Dewey's stead. The other mployee had been on the Local's out-of-work list longer (Tr. 17–119).

had a telephone conversation with a Mr. Ziff, a official of Local 6 (Tr. 119–120). After the conversa tion ended O'Keeffe, Jr. told employee Dewey "t hell with the union we don't need those bastards we will go non-Union" (R. 13; Tr. 119–120). Later in July, 1964, O'Keeffe, Jr. asked Dewey to listen in on a telephone conversation between O'Keeffe, Sr and Mr. Ziff. Dewey testified (R. 14; Tr. 121):

> A. The conversation was about what th Union conditions were, what they were going to do about that, and Mr. O'Keeffe, Sr. said as I recollect, he stated the Company had three courses of action to take.
>
> One was to go out of the Union completely the second was to change the name of th company; and the third was to go into th Sheetmetal Workers, the Sheetmetal Produc tion Workers Union, Local 355.
>
> Q. What, if anything, did Mr. O'Keeffe, Jr say?—A. He felt he wanted to change th name of the company rather than go non-union or go into the Sheetmetal Production Workers Union.
>
> Q. What did Mr. O'Keeffe, Sr. say to that?— A. He felt the best solution, because of th Union situation in San Francisco, was to g into Local 355 rather than be non-Union an it would be less expensive than the other tw alternatives.
>
> Q. Did Mr. O'Keeffe, Jr. say anything further?—A. He came to the conclusion tha his father was right.

Thereafter, respondent determined to enter int a contract with Local 355 of the Sheetmetal Workers covering respondent's maintenance employees (R. 13

Tr. 176–180, R. Exh. 1). The Local 6 agreement had provided that employees in respondent's shop would earn around $4 an hour; the Sheetmetal Workers Local agreement provided that production workers would receive $2.71 an hour (R. 13; Tr. 109, R. Exh. 1, p. 5). Subsequently, respondent asked its maintenance employees to execute wage assignments for initiation fees and dues in favor of Local 55. (R. 13; 155–156, 180–188). O'Keeffe, Jr. explained to employee Hernandez in November of 1964 that he wanted Hernandez to join the Sheetmetal Union because "he didn't want to meet the electrical workers' pay rates." (R. 13; Tr. 166).

. Local 6 questions employee Dewey about his membership; the employees join Local 6; respondent lays them off—permanently

Sometime in February 1965, Richard Dewey was working on a job for respondent under contract with Riviera Convertible Mattress Company when he was ontacted by Ralph Bell and another business agent f Local 6 (R. 14; Tr. 122). The Union officials sked to see Dewey's membership card, and when e said he did not have one, they told him to get in ouch with his employer and to have him contact iem immediately. Dewey called O'Keeffe, Jr., who ent out to the job and after hearing Dewey's ccount of what had happened, instructed him to go ack to the shop early (R. 14; Tr. 40, 122–123).

As a result of Dewey's experience, he, Cliff, Davies, nd Walters discussed with one another the possiility of applying for membership in Local 6 in order o increase their job security. That discussion took lace in the shop. A second meeting concerning the

same subject included employee Hernandez and took place on February 19, 1965 (R. 14; Tr. 104, 115–116 146–148). Office Manager Dan Martin listened into one of the conversations through an intercom system and was observed by employee Walters (R. 14; Tr 104–105, 116, 148). Martin then came into the shop and joined the group. When one of the employees asked Martin what he thought of the idea of the employees joining Local 6, Martin declined to express an opinion (R. 14; Tr. 105, 115–117, 149).[4]

On February 23, 1965, Dewey, Hernandez, Cliff Walters and Davies joined Local 6 (R. 15; 102 113–115, 146, 158–159). The next day all the maintenance employees except Moniz were terminated although it was not a regular payday. When they returned to the shop after work, O'Keeffe gave them their terminal checks and told the employees that the layoff was due to financial difficulties and that they might be recalled in two or three days. But O'Keeffe, Sr., who owned the business, commented that it might be a longer time (R. 15; Tr. 15, 27–28 138–139, 158–159).[5] Except for Beurnez, none of the employees was ever offered reinstatement.

D. After the discharges, O'Keeffe tells Dewey and Hernandez that the discharges were "a question of the thing that you did behind my back"

In a telephone conversation with former employee Hernandez in March 1965, O'Keeffe, Jr. asked Hernandez whether he had been unfair with him

[4] The Board's finding that Martin overheard the conversation is based upon the uncontradicted testimony of several of the employees involved. Martin was not called to the stand.

[5] O'Keeffe, Jr. testified that he kept Moniz on because he was working on the Riviera job, the one on which Dewey had also been working (Tr. 58).

O'Keeffe asked Hernandez if he had anything to say. Hernandez replied, "I thought he had been unfair because he had fired us and the next day he had hired new employees * * *." Hernandez testified that O'Keeffe then asked "unfair in what way?" Hernandez replied, "I didn't think the company had financial troubles." O'Keeffe asked "well, did you come to me." and when Hernandez said "no" O'Keeffe said "I was left with no alternative. There was something going on behind my back" (R. 15; Tr. 54–55; 161–163, 219). O'Keeffe explained that the other employees did not have enough "guts" to talk to him about it and that if they had, he would have explained "the whole problem." Hernandez replied that the employees were not trying to "screw" O'Keeffe, but that they had sought better schooling and more job security by joining the Union. O'Keeffe again asked why the employees had not discussed the problem with him, and Hernandez replied "* * * we didn't have [a] chance because the same day we got fired" (IR 16; Tr. 162–163).

On March 26, 1965, O'Keeffe, in a conversation with Dewey, asked him "do you think it was fair to incite the employees behind my back about going to the Union?" O'Keeffe said, in effect, that except for the employees going to Local 6 behind his back, all their jobs were secure and that "Dan [Martin, the office manager] overheard you talking about going to the Union in the outer office. He added, what do you think I am, a fool? You really didn't think the Union would clear you out, did you?" (R. 15–16, Tr. 125–126).

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E. Respondent rehires Yves Beurnez the day after the other employees are laid off and hires additional employees thereafter

On February 25, 1965, respondent hired an employee to replace Dewey (G.C. Exh. 23); on February 26, respondent rehired employee Yves Beurnez, who had initially been hired on February 18, a few days before the layoff (R. 16; Tr. 18, G.C. Exh. 24). Shortly, thereafter, the remaining employees went to Local 355 and signed its out-of-work list (R. 16; Tr. 304–305, 307, 308, 309). They reported weekly, searching for work.[6] Respondent hired new employees "off the street" on March 1 and 17 and, after placing an ad in the newspaper, hired employees on March 22, May 10, 24, June 7 and August 23 (R. 16; Tr. 288, G.C. Exhs. 15, 10, 7, 14, 20, 16, 17). None of the other terminated employees was rehired.

II. The Board's conclusion and order

On these facts, the Board found that respondent had discriminatorily discharged Davies, Dewey, Hernandez, Walters, Cliff, Rosales and Beurnez.[7] Accordingly, the Board directed respondent to cease and

[6] O'Keeffe testified that when he needed employees after February 24, he called the Sheetmetal Workers Union but could not obtain qualified men (R. 5; Tr. 99–100, 208). He admitted that he did not ask for any of the terminated employees by name (*ibid.*).

[7] Neither Beurnez nor Rosales had signed union cards or, so far as the record shows, had engaged in any concerted activity. The Board concluded (R. 6) that "the facts are strong enough here to warrant a finding that the entire group was discharged because of the protected activity of part of the group. Such a mass discharge discourages union activity of all employees and violates Section 8(a)(3) and (1). *Arnoldware, Inc.*, 129 NLRB 228, 229."

sist from discouraging membership in and activi-
s on behalf of Local 6, I.B.E.W. by discharging
d laying off, or failing to reinstate its employees,
d from in any like or related manner interfering
th, restraining, or coercing its employees in the exer-
se of their Section 7 rights.[8] In addition, the Board
rected respondent to make the employees whole for
e losses in wages they had suffered and to offer
ll reinstatement to those employees not yet rehired
R. 7). Finally, the Board's order directs respondent
post the usual notices stating its intent not to
olate the Act in the manner found.

ARGUMENT

he Board's determination that respondent discharged its employees because of their union activity is supported by substantial evidence

The Board's finding that respondent discharged
s employees because they had joined Local 6 is
erwhelmingly supported by the evidence in the
cord. First, all the employees were discharged the
y after most of them joined Local 6. Second, the
cord shows that respondent knew about its em-
oyees' plans because Office Manager Dan Martin
d overheard them discussing their intention to join
ocal 6. The record further establishes through the
stimony of respondents' own officials that they
anted the employees to be members of Local 355,
ther than Local 6. Thus, O'Keeffe, Jr. testified that

[8] Section 7 grants employees the right to join unions or to
gage in other concerted activities and the right to refrain
om such activity.

"we always have been union" (Tr. 176). In answ
to the question "what did you do to maintain t
union shop with Mr. Dewey in your employ" (T
176), O'Keeffe, Jr. testified "we checked it with
Local that was representing my father's worke
that were employed in the same shop and they sai
yes, they covered this type of work and they cou
cover these individuals (Tr. 177)." Asked wheth
he (O'Keeffe) entered into an agreement with t
union that covered other employees in the buildin
O'Keeffe, Jr. testified "yes" (Tr. 177). There is
evidence that any of respondents employees h
joined Local 355 before O'Keeffe's decision to de
with it. And the record shows (R. 2; Tr. 166) th
O'Keeffe, Jr. preferred Local 355 because its wa
rates were lower.

Respondent's contention before the Board that
laid off the employees because of a cash shorta
was properly rejected, since the evidence shows th
that argument was a pretext. A tabular summary of
spondent's net profit, assets and surplus through t
years 1961–1965 (R. 5; G.C. Exh. 26–30), sho
clearly that respondent's surplus position had be
far worse in previous years when it had not la
off employees (R. 6; Tr. 271–272).[9] Furthermore,
the record shows, respondent hired numerous e
ployees in the months following the lay offs, b
never offered any of the laid off employees (exce
Beurnez) reinstatement. Finally, as shown in t

[9] O'Keeffe, Jr. testified that business was improving and th
the firm's bank account had been overdrawn before (Tr. 32, 3

Statement, O'Keeffe admitted to Hernandez and Dewey that its motivation in laying off its employee's was their going behind O'Keeffe's back and joining the union. Even without all this evidence, the Trial Examiner's discrediting of the testimony of respondent's manager and owner that the discharges were precipitated by its poor cash position is entitled to stand on review in the absence of evidence (and there is none here) that the Trial Examiner's credibility determination is unreasonable. See *N.L.R.B.* v. *State Center Warehouse Co.,* 193 F. 2d 156, 157 (C.A. 9); *N.L.R.B.* v. *Stanislaus Implement & Hardware Co.,* 266 F. 2d 377, 381 (C.A. 9); *N.L.R.B.* v. *Pine Products Co.,* 361 F. 2d 480 (C.A. 9). Under the circumstances, we submit, the Board's order should be enforced in full—including that portion relating to employees who did not join Local 6 but were victims of respondent's mass reprisal. See *American Bottling Corp.,* 99 NLRB 345, enf'd *per curiam,* 205 F. 2d 421 (C.A. 5), cert. denied, 346 U.S. 921; *Arnoldware, Inc.,* 129 NLRB 228, 229 & n. 1 (citing cases). Cf. *N.L.R.B.* v. *Somerset Shoe Company,* 111 F. 2d 681 (C.A. 1); *N.L.R.B.* v. *Stremel,* 141 F. 2d 317 (C.A. 10); *N.L.R.B.* v. *Somerset Classics Inc.,* 193 F. 2d 613 (C.A. 2), cert. denied, *sub nom; Modern Manufacturing Co.* v. *N.L.R.B.,* 344 U.S. 816.[10]

[10] Respondent argued to the Examiner that the Board lacked jurisdiction over its operations because the employees were not members of a bargaining unit covered by the Association's contract with Local 6. But it is clear that respondent's discharge of these employees for joining Local 6 could have prompted a strike by that Local against respondent and, con-

CONCLUSION

For the reasons stated the Board respectfully requests that its order be enforced.

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JUNE 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

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ceivably, against the Association of which it is a member. Under the circumstances, the law is plain that the Board had jurisdiction over respondent's operations, since it was a member of the Association. For it is the effect on interstate commerce of the employer's entire business, and not the effect on any single group of his employees, that is determinative of the Board's jurisdiction under the Act. See, e.g., *Pearl Beer Distributing Co.* v. *N.L.R.B.*, 331 F. 2d 301, 302 (C.A. 5), cert. denied, 379 U.S. 830. See generally, *N.L.R.B.* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226 and cases cited therein; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 389 (C.A. 9), cert. denied, 341 U.S. 909.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record * * *. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28

APPENDIX B

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
(a)-1(j)	6		7
-24	16		18
5	24		26
6-30	29		30
1	102		103
2	114		114
3	146		147
4	158		159
5	170		170
6 and 37	229		
6	285		296
7	293		294

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
	177		179
and 3	181		188
	182		188
	193		197
	202		223
	291		291

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